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No. 1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Southern Railway Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia (R. 142) is not officially reported. It is printed at page 1a, *infra*. The opinion of the Court of Appeals for the Fifth Circuit (R. 159) is reported at 364 F. 2d 86, and is printed at page 12a, *infra*.

JURISDICTION

The judgment of the Court of Appeals (R. 181; p. 29a, *infra*) was entered on July 27, 1966. A timely-filed petition for rehearing en banc was denied by that Court on September 22, 1966. (R. 244; p. 30a, *infra*) On December 4, 1966, Mr. Justice Black extended the time for filing this petition to and including February 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under a section of the Interstate Commerce Act which authorizes the Interstate Commerce Commission to issue, without notice and hearing, car service "directions" to deal with an "emergency", the Commission may lawfully, without notice and hearing, establish general car service regulations of nationwide application to deal with a chronic problem, when another section of the Act provides that the Commission may establish "rules, regulations, and practices" relating to car service only "after hearing".

2. Whether a defendant in an action brought by the United States to recover penalties for alleged violations of a car service order issued by the Interstate Commerce Commission without notice and hearing is precluded from challenging the validity of the order.

STATUTES INVOLVED

Sections 1(14)(a) and 1(15) of the Interstate Commerce Act provide as follows:

Section 1(14)(a), 49 U.S.C. 1(14)(a):

"Establishment by Commission of rules, etc., as to car service.

"(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices."

Section 1(15), 49 U.S.C. 1(15):

"Powers of Commission in case of emergency.

"Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to

the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded."

STATEMENT

On May 31, 1963, a 15-count civil penalty action was brought by the United States against petitioner Southern Railway Company charging violations of Second Revised Service Order 939, relating to freight car service, issued by the Interstate Commerce Commission. The complaint, filed in the United States District Court for the Middle District of Georgia, sought the statutory maximum of $500 on each of the 15 counts. (R. 1-24)

Differing factual situations were involved in the various counts. Generally, however, the first 10 counts (R. 2-17) alleged failures to observe the requirement of Subparagraph (b)(3) of the Service Order (R. 128) that:

> "Cars locating in a home district may be used only for loading to a destination on or via owner's rails or to a junction with the owner."

Counts 11 through 15 (R. 17-24) alleged that Southern had disobeyed Subparagraph (b)(4) of Service Order 939 (R. 128) which stated that:

> "Cars locating in a district adjacent to a home district may be used only for loading to a home district or beyond if routed via the owner."

After the filing of petitioner's answer (R. 30-40) respondent moved for summary judgment as to 13 of the 15 counts of the complaint (R. 41) and petitioner filed a cross-motion with respect to all counts (R. 101). One of the grounds of petitioner's motion was that the Service Order which it was charged with violating was void and invalid because Section 1(15) of the Interstate Commerce Act, upon which the Commission had relied in promulgating it without notice and hearing, in fact provided no authority for its promulgation. This argument was predicated essentially on the proposition that Section 1(15) does not permit the Commission to disregard the normal requirements of notice and hearing in issuing broad rules and regulations, like Service Order 939, of general applicability and designed to deal with a chronic problem such as what the Commission has characterized as a long-standing nationwide car shortage, but rather is addressed only to the issuance of particularized car-service "directions" in emergency situations. Petitioner urged that this was clear

not only from the language of Section 1(15), but by reason of the fact that the immediately preceding Section of the Interstate Commerce Act (§ 1(14)) expressly deals with the Commission's authority to establish "*after hearing* * * * reasonable rules, regulations and practices with respect to car service." (Emphasis added.)

Petitioner's argument was made in the context of the following factual background:

Since the end of World War II the railroad industry in the United States has, according to the Interstate Commerce Commission, been plagued by a first sporadic and, since around 1950, chronic shortage of freight cars. The existence of this shortage has been consistently and explicitly referred to in numerous official publications of the Interstate Commerce Commission, issued over a period of some 20 years. Thus the Commission's Annual Report for 1947 (I.C.C. 61st Ann. Rep., at p. 128) stated that "The shortage of railroad boxcars and open-top cars is acute." Similar statements were made in succeeding years. See, *e.g.*, I.C.C. 64th Ann. Rep., 1950, at p. 30 ("Since the week ended May 20 a drastic and widespread shortage of cars of all classes has been experienced"); I.C.C. 68th Ann. Rep., 1954, at p. 50 ("The adequacy of the boxcar fleet is of concern to us because, since January 1954, the boxcar ownership has progressively deteriorated while the number of unserviceable boxcars has increased"); I.C.C. 70th Ann. Rep., 1956, at p. 159 ("Freight cars, particularly boxcars, have not been in sufficient supply to meet commercial demands for many years"); I.C.C. 71st Ann. Rep., 1957, at p. 136 ("Shortages of freight cars, particularly boxcars, have reached serious proportions in recent years"); I.C.C. 72d Ann. Rep., 1958, at p. 135 ("At various times during the last 12 years,

the Nation has been faced with a critical shortage of freight cars"); I.C.C. 74th Ann. Rep., 1960, at p. 184 ("The freight-car supply situation has been a serious problem for many years"); I.C.C. 75th Ann. Rep., 1961, at p. 106 ("The decrease in the ownership of plain boxcars caused great concern"); I.C.C. 75th Ann. Rep., 1962, at p. 198 ("The Commission has for a number of years been greatly concerned with the diminishing supply of railroad freight cars and the critical shortages that have occurred during periods of peak loadings"); I.C.C. 77th Ann. Rep., 1963, at p. 17 ("The Nation is faced with one of the most serious boxcar shortages in its history"); I.C.C. 78th Ann. Rep., 1964, at p. 38 ("Car shortages prevailed throughout the year but were accentuated during peak harvest movements of grain and other crops"); I.C.C. 79th Ann. Rep., 1965, at p. 49 ("Car shortages during the fiscal year of 1965 occurred with greater frequency and severity").

As early as 1946 the Interstate Commerce Commission instituted, on its own motion, an investigation and hearing to consider whether to attempt to ameliorate the alleged freight car shortage by exercising its authority under Section 1(14) of the Act to establish, after hearing, car services rules, regulations and practices of general application. The Commission ultimately concluded not to establish any such rules, regulations or practices.[1]

In 1950 the Commission did issue a car service order of general and nationwide application.[2] In promulgating this order, however, the Commission held no hearings as required by Section 1(14) but instead pur-

[1] Car Service, Freight Cars, 268 I.C.C. 687 (1947).

[2] Car Service Order No. 866, issued Sept. 11, 1950, effective Sept. 20, 1950.

ported to act under Section 1(15), which authorizes the issuance of car service "directions" without hearing in cases of "emergency". The order was several times extended and did not expire finally until December 31, 1953. In mid-1955 a similar order was promulgated without hearing, again purportedly pursuant to the Commission's authority to issue emergency directions;[3] shortly after this order expired, at the end of 1955, still another substantially identical order was issued under the same procedures, and remained in effect during most of 1956.[4]

During the remainder of the 1950's and the early 1960's the Commission, as earlier noted, continued to proclaim the existence of a substantially unbroken freight car shortage of serious dimensions. It did not, however, see fit to institute any proceeding under Section 1(14) of the Act looking toward the establishment of rules, regulations and practices to ameliorate those shortages. When in 1962 the Commission finally again took action of general application with respect to the question of car service, it again acted without notice and hearing in issuing Service Order 939, which in its "second revised" version is the order involved in this case.

Service Order No. 939, as originally promulgated and as revised, applied generally to all rail common carriers subject to the Interstate Commerce Act. It applied generally to all plain wide-door 40 foot or longer boxcars and to all 50 foot or longer boxcars. It purported to regulate generally and in all circumstances the use to be made of such boxcars in terms of the desti-

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[3] Car Service Order No. 904, issued July 7, 1955, effective July 25, 1955.

[4] Car Service Order No. 910, issued March 19, 1956, effective April 9, 1956.

nations to and directions in which they might be loaded. The order characterized its own requirements as "rules, regulations, and practices" even though Section 1(15), unlike Section 1(14) which contains a requirement of notice and hearing, does not purport to permit the establishment of "rules, regulations, and practices" but only the making of "directions." In its original form and as amended and revised, the order persisted in effect from May 27, 1962, to November 11, 1963. The incidents charged in this action to constitute violations of the order took place in March and April 1963.

The District Court granted petitioner's motion for summary judgment. Noting that "the Commission's *normal* authority to issue regulations is derived from § 1(14)(a) of the Interstate Commerce Act" and that "the *abnormal* powers, the summary powers, of the Commission are conferred upon it by § 1(15) of the Act," it held that the authority to make emergency directions was not intended as an alternative to the regular rule-making power of the Commission, as the Commission had in effect treated it in Service Order 939.

Respondent appealed to the Court of Appeals for the Fifth Circuit. That court reversed the District Court's judgment. It first held that the District Court had erred in entertaining petitioner's challenge to the validity of Service Order No. 939; that such a challenge may be made only in a proceeding initiated for that purpose before a three-judge court; and that no defendant in a civil penalty action for violation of such an order is entitled to assert such a challenge by way of defense. It held also that the Service Order was in fact a valid exercise of the Commission's emergency authority under Section 1(15) of the Interstate Commerce Act.

REASONS FOR GRANTING THE WRIT

The decision of the court below betrays a fundamental misunderstanding of important provisions of the Interstate Commerce Act. The effect of the decision has been to deny to petitioner an administrative hearing prior to the promulgation of the order that it is charged with violating, and then to deny it a judicial hearing when that order is sought to be enforced against it. Such a denial of conventionally available procedural rights should not be sanctioned by this Court absent the clearest kind of statutory compulsion. The statutes relevant here, far from providing any such compulsion, on their face militate strongly against the result reached below.

Sections 1(14) and 1(15) of the Interstate Commerce Act were designed by Congress to provide a complementary scheme for exercise of the Interstate Commerce Commission's power over car service. The former section grants to the Commission broad authority to establish rules, regulations and practices after notice and hearing; the latter enables it to issue directions in emergency situations where notice and hearing are impractical.

The Commission's implementation of this important statutory scheme has distorted it out of all recognition. Since 1917, when the two sections were enacted, the Commission has issued almost *one thousand* so-called emergency car service orders under Section 1(15). During the same 50-year period it has issued at most only a handful of Section 1(14) orders, and those orders that dealt essentially with compensation rather

than with car handling aspects of car service.[5] Although many of the orders issued by the Commission without notice or hearing have been true emergency directions of the kind sanctioned by Section 1(15), a substantial and, significantly, ever increasing proportion have been broad and pervasive regulations, general rather than *ad hoc* in their application and directed to chronic problems rather than sudden emergencies.

It can hardly be denied that if the Commission's own pronouncements are taken at face value the problem of a nationwide shortage of freight cars has been a chronic rather than a suddenly emergent one. As pointed out in our Statement, the Commission has proclaimed its existence for more than 15 years. It has thus had every opportunity to hold and complete, long prior to the issuance of Service Order 939, hearings looking to the establishment of reasonable rules, regulations and practices that might have served to ameliorate the claimed shortage. No valid reason appears or has in this case been suggested why the Commission has declined to utilize this opportunity, but has proceeded over this period of more than 15 years by a series of "emergency" orders addressed to a single continuing problem.

By putting its stamp of approval on action by which the Commission has in effect read out of the Interstate Commerce Act one of its provisions, and utilized another provision to accomplish ends for which it was not

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[5] One such order, increasing per diem charges on freight cars to a penalty level, was set aside by a three-judge court on the ground that the Commission was without authority to take this particular action under Section 1(14). Palmer v. United States, 75 F. Supp. 63 (D.D.C. 1947). The *Palmer* case has recently been legislatively overruled. Pub. L. 89-430, May 26, 1966, 80 Stat. 168.

designed, the court below ignored a basic principle of statutory construction frequently articulated in decisions of this Court. It violated the "cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsberg* v. *Popkin,* 285 U.S. 204, 208. It ignored the stricture that "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." (*Ibid.*) In the instant case, as in *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307, "the statute admits a reasonable construction which gives effect to all of its provisions." Here, as in *Jarecki,* this Court should not permit the Commission or the lower courts to "adopt a strained reading which renders one part a mere redundancy." See also *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555, 560; *United States* v. *Menasche,* 348 U.S. 528, 538-39; *Singer* v. *United States,* 323 U.S. 338, 344.

The legislative history of Section 1(15) confirms what is apparent from the face of the statute. It shows beyond peradventure that the authority to make "just and reasonable directions with respect to car service" without notice, hearing or the making or filing of a report was intended merely to enable the Commission to deal on a short range basis with particularized emergency problems, and that this stop-gap authority was not designed to substitute for considered solutions to continuing problems, arrived at after full and fair hearings. In testimony before the House Committee which was considering the original car service legislation promulgated in 1917, I.C.C. Commissioner Hall, speaking for the Commission, clearly articulated the

appropriate scope of the power to issue emergency car service directions. He stated:

> "But to make clear what I may not have made clear—what is contemplated in a time of emergency is not the substituting of new rules for old. What is contemplated is the giving of specific directions as to specific things, right on the ground, as, for example, Chicago, if the situation is congested there. The Commission, through such agency as it may select for that purpose, says to one carrier 'you take fifty empty cars and deliver them to that road; you take 100 empty cars, and deliver them to that other road.' " (*Hearings Before the House Committee on Interstate and Foreign Commerce* on H.R. 19546, H.R. 20256 and H.R. 20352, 64th Cong. 2d Sess., p. 36 (1917).)

The Commissioner went on to compare the Commission's car service function in an emergency to that of a policeman in a traffic jam. *(Ibid.)*

A proper use of the Commission's Section 1(15) powers is illustrated by Service Orders 2 and 3, issued shortly after enactment of the statute. Those orders directed certain named roads to supply, during a 30-day period, a specified number of empty freight cars each day to certain other named roads to ameliorate shortages of certain equipment in particular areas. This kind of order serves a function truly like that of a policeman in a traffic jam. It stands in vivid contrast to Service Order 939 and its amendments and revisions, which purported to regulate, over a period of some 18 months, the practices of all railroads throughout the country with regard to the loading and routing of boxcars.

Although it has throughout this litigation tenaciously defended the proposition that the Commission's au-

thority under Section 1(15) is broad enough to encompass promulgation of the order at issue, respondent has not candidly faced the implications of this position in terms of its negation of Section 1(14). The Commission and respondent—and the court below—have failed to suggest any function that the latter statute can serve in light of their interpretation of the former. This fact is itself eloquent evidence that that interpretation is improperly expansive. It is time that the proper relationship between Sections 1(14) and 1(15) be authoritatively defined in order to curb the Commission's abuse of the extraordinary summary powers granted it by the latter section. That result can be accomplished only by issuance of the writ in this case.

The Court of Appeals' additional holding, that the validity of a car service order may be tested only in a proceeding initiated for that purpose before a statutory three-judge court invoked pursuant to 28 U.S.C. § 2325, is in direct conflict with the action of this Court in *United States* v. *Koenig Coal Co.*, 270 U.S. 512, and *United States* v. *Michigan Portland Cement Co.*, 270 U.S. 521, both involving a challenge to the validity of car service orders, and is irreconcilable in principle with other decisions of this Court. *Flemming* v. *Nestor*, 363 U.S. 603; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144; *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243.

Koenig Coal and *Michigan Portland Cement* both involved indictments under the Elkins Act. The cement company was charged with receiving and the coal company with giving a preference or priority forbidden by a service order issued by the Interstate Commerce Commission under Section 1(15). In both cases this Court expressly considered, on the merits, challenges to the

validity of the service order raised by the defendants, rather than holding, as the Court of Appeals has here held, that no such challenge will lie outside a three-judge court proceeding. Other cases in which such challenges have been considered in contexts other than a review proceeding before a three-judge court include *Atlantic Coast Line R. Co.* v. *United States,* 140 F. Supp. 569, 571 (Ct. Cl. 1956); *Boston & Maine R. Co.* v. *United States,* 169 F. Supp. 957, 959 (Ct. Cl. 1959); *Western Maryland R. Co.* v. *Commodity Credit Corp.,* 154 F. Supp. 508, 511 (D. Md. 1957); *Reading Co.* v. *Commodity Credit Corp.,* 159 F. Supp. 67, 70 (E.D. Pa. 1958), *rev'd on other grounds,* 289 F. 2d 744 (3d Cir. 1961); and *United States* v. *Thompson,* 58 F. Supp. 213 (E.D. Mo. 1944).

In both *Nestor* and *Mendoza-Martinez* the question presented was whether 28 U.S.C. § 2282, providing that an application for "an interlocutory or permanent injunction restraining the enforcement, operation or execution" of a federal statute must be "heard and determined by a District Court of three judges," precluded challenges to a statute in other forums. In *Nestor* the plaintiff sued in a single-judge district court to attack an order terminating his old age insurance benefits, alleging that the statute pursuant to which the order had been issued was unconstitutional. This Court held that Section 2282 did not prevent this mode of challenge. It pointed out that the action

> "did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis* it would have no other result than to re-

quire the payment of appellee's benefits." 363 U.S. at p. 607.

In *Mendoza-Martinez* this Court held that even an action for a declaratory judgment of unconstitutionality did not require the convening of a three-judge court, observing that

> "The present action, which in form was for declaratory relief and which in its agreed substance did not contemplate injunctive relief, involves none of the dangers to which Congress was addressing itself. The relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion. There was no interdiction of the operation at large of the statute." 372 U.S. at p. 155.

The statute relating to review of Interstate Commerce Commission orders by three-judge courts, 28 U.S.C. § 2325, is in pertinent part identical to 28 U.S.C. § 2282.[6] The court below, by giving the former statute an exclusive effect that this Court has specifically denied to the latter, has, we submit, rendered a judgment in conflict not only with *Koenig Coal* and *Michigan Portland Cement* but also with *Nestor* and *Mendoza-Martinez.*

The court below sought to distinguish *Nestor* and *Mendoza-Martinez* by reference to Section 17(9) of the Interstate Commerce Act, construing the words "but not otherwise" in this statutory provision to mean that Interstate Commerce Commission orders may be reviewed in the courts only in the manner set forth there-

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[6] 28 U.S.C. § 2325 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

in, *i.e.*, "under those provisions of law applicable in the case of suits to enforce, enjoin, suspend or set aside orders of the Commission."[7]

We submit that this interpretation of Section 17(9) is demonstrably erroneous. Nothing in the terms or history of that statute, which became law in 1940, remotely suggests that it was intended to change the principle recognized in *Koenig Coal* and *Michigan Portland Cement* that Commission car service orders may be challenged defensively by carrier defendants. In fact it was designed to serve a quite different function—and one that respondent and the court below have completely misapprehended. That function was simply to require that an application for rehearing addressed to the full Commission must precede "a suit to enforce, enjoin, suspend, or set aside" an order of a Commission division, an individual Commissioner or a board, and thus legislatively to overrule *United States* v. *Abilene & Southern R. Co.*, 265 U.S. 274.[8] Section 17(9) simply

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[7] Section 17(9) provides:

"(9) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

[8] The *Abilene* case had held that a petition for reconsideration addressed to the Commission was not a condition precedent to "a suit to enforce, enjoin, suspend or set aside an order of a division, Commissioner or board."

does not say what the court below in effect read it as saying, that the validity of Commission orders may be "drawn in question" only in a three-judge court "but not otherwise". Rather by its terms the section relates only to "a suit to enforce, enjoin, suspend, or set aside." See *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243. It is thus totally inapposite here because petitioner's defense of invalidity of Service Order 939, although drawing in question the validity of that order, is not "a suit to enforce, enjoin, suspend, or set aside" the order. Indeed, unlike the situation in *Nestor* and *Mendoza-Martinez* it is not even a "suit." Those cases are thus of *a fortiori* application here.

The fallacy in respondent's reliance in the court below on Section 17(9) is strikingly illustrated by the fact that service orders purportedly invoking the authority of Section 1(15) have with increasing frequency been issued by the full Commission in the first instance.[9] Since Section 17(9) concededly has no application whatever to such orders, as opposed to orders issued by divisions, Commissioners or boards, acceptance of the Court of Appeals' reasoning would require the drawing of a distinction between the right of a carrier to challenge in a civil penalty action the validity of a car service order originally issued by the Commission, on the one hand, and one initially issued by a division, Commissioner or board, on the other. No possible basis in

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[9] See, *e.g.*, Car Service Order No. 975, issued March 16, 1966, effective March 21, 1966; Revised Service Order No. 975, issued March 29, 1966, effective March 30, 1966; Second Revised Service Order No. 975, issued April 14, 1966, effective April 18, 1966; Amendment No. 2 to Second Revised Service Order No. 975, issued December 8, 1966, effective December 31, 1966.

law can be suggested for the drawing of any such distinction.

Section 17(9) thus provides no basis for distinguishing the decision of the court below from those of this Court in *Koenig Coal Co., Michigan Portland Cement, Nestor* and *Mendoza-Martinez,* and the writ should issue to correct the error caused by the Court of Appeals' failure to follow those controlling decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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